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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 904

In the Matter of the Petition of MOORE-McCORMACK LINES, INC., as owner of the S.S. "MORMACKITE," for exoneration from or Limitation of Liability.

ARMCO STEEL CORPORATION and WESSEL DUVAL & CO., INC.,
Cross-Petitioners,

MOORE-McCORMACK LINES, INC.,
Cross-Respondent.

CROSS-PETITION OF ARMCO STEEL CORPORATION AND WESSEL DUVAL & CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Armco Steel Corporation and Wessel Duval & Co., Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 30, 1959, holding that cross-respondent is entitled to limit its liability for the loss of the cargo owned by cross-petitioners.

Citations to Opinions Below

The District Court opinion is reported at 164 Fed. Supp. 198 and is printed in the Court of Appeals Appendix of Moore-McCormack Lines at pp. 685-722.

That appendix has been filed in this Court by Moore-McCormack as petitioner for a writ of certiorari, No. 871.

The Court of Appeals decision is reported at 272 F. (2d) 873 and is printed in Appendix B to Moore-McCormack's petition for certiorari at pages 14-24. The decision denying the petition of Armco and Wessel Duval for a rehearing *en banc* is not reported but it appears in Apendix B to the Moore-McCormack petition at page 28. The decision denying the petition of Armco and Wessel for a rehearing is not yet reported but is printed in Appendix B to the Moore-McCormack petition at pages 29-31.

Jurisdiction

The judgment of the Court of Appeals was entered on November 30, 1959. The petition of Armco and Wessel for a rehearing was denied on April 4, 1960. The jurisdiction of this Court is invoked under 28 U. S. Code par. 1254.

Questions Presented

1. Has not the Court of Appeals for the Second Circuit, in reversing certain findings of fact of the District Court, violated the principle of the decision of this Court in *McAllister v. U. S.*, 348 U. S. 19?

2. Has not the Court of Appeals for the Second Circuit, in reversing the judgment below denying cross-respondent's claim to limitation of liability for the loss of the cargo, on the basis of a deposition on discovery proceedings before trial of a witness who

lived in New York City and attended the trial and whose deposition the District Court and a prior panel of the Court of Appeals had refused to receive in evidence, violated a United States statute; Rule 26 (d) (3) of the Federal Rules of Civil Procedure, Supreme Court Admiralty Rule 46, and Admiralty Rule 32 of the Southern District of New York. Has not that Court acted capriciously and arbitrarily and "so far departed from the accepted and usual course of judicial proceeding * * * as to call for an exercise of this Court's power of supervision"? (Supreme Court Rule 19, 1 (b)).

3. Will not the practice which the Court of Appeals for the Second Circuit has adopted in this case lead to disruption of the administration of justice in that Court and other Courts of Appeal?

4. Is not the decision of the Court of Appeals for the Second Circuit in conflict with applicable decisions of this Court and of other Courts of Appeal in holding that cross-respondent is entitled to limit its liability for the loss of cargo although the established unseaworthiness of the "Mormackite" was a breach of cross-respondent's personal contract?

Statutes Involved

The statutes and rules involved are the Limitation Act (46 U. S. C. secs. 181-189), the Carriage of Goods by Sea Act (46 U. S. C. secs. 1300-1315) and former sec. 641 of 28 U. S. C., now included in 28 U. S. C. Chapter 117. The Rules involved are those set out in Question 2 above. The applicable sections of the Limitation Act appear in Appendix A to the Moore-

McCormack petition at pp. 11 and 12. The applicable parts of former sec. 641 of 28 U. S. C. and the Rules, appear in Appendix A to this petition; and the applicable portions of the Carriage of Goods by Sea Act appear in Appendix B.

Statement

Cross-respondent's S.S. "Mormackite," loaded with 9003 tons of iron ore and 500 bags of cocoa beans, sailed from Vitoria, Brazil, for Baltimore on September 25, 1954. Particularly smooth seas were encountered from the time of sailing to the morning of October 7th when the vessel was off Cape Hatteras. During that morning her cargo of iron ore shifted and in spite of strenuous efforts to correct the resulting list, the vessel went over on her port side and sank at about 9:45 a.m. There was no opportunity to launch her small boats or to send out a radio call for assistance.

Of the ship's complement of 48 men, 37 lost their lives in the disaster and 11 survivors were picked up after some 50 hours in the water. Her cargo was lost.

Having concurrently found that the disaster directly and solely resulted from the vessel's unseaworthiness existing by reason of cross-respondent's negligence, both courts below held that cross-respondent is liable for the loss of life, for the personal injuries of those who survived, and for the loss of cargo. Both courts also held that cross-respondent is not entitled to limitation of its liability for the loss of life nor for the personal injuries: the unseaworthiness resulted from improper stowage of which the master had full knowl-

edge and the master's "privity and knowledge" defeats a vessel owner's claim to limitation of liability for loss of life and personal injuries (46 U. S. C. sec. 183 (e); App. A to Moore-McCormack petition).

The District Court held that the established "privity and knowledge" of cross-respondent's managing officers defeated its claim to limitation of liability for the loss of the cargo. Although the Court of Appeals held that the cross-respondent was liable for the loss of the cargo under the provisions of the Carriage of Goods by Sea Act because due diligence to make the vessel seaworthy was not exercised (46 U. S. C. sec. 1303, Appendix B to this petition), it reversed the finding of fact of the District Court that cross-respondent's executive officers were in privity with the cause of the disaster and held that cross-respondent was entitled to limit its liability. The Court of Appeals also held that no breach of cross-respondent's personal contract destroyed its right to limitation.

The stipulated value of the lost cargo was $136,658.76. The limitation fund is only $2000.

Reasons for Granting the Writ Prayed for in This Cross-Petition

A. First, Second and Third Questions:

These questions are so intertwined as to require consideration together.

In *McAllister* v. *U. S.* (*supra*) this Court said (348 U. S. at p. 20):

"In reviewing a judgment of a trial court sitting

> without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in Admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure."

It seems clear that this Court employed the language quoted to discourage non-meritorious appeals. The practice followed by the Court of Appeals in the present case is bound to encourage such appeals.

The District Court gave very careful attention to the large mass of factual and expert testimony offered before it; discussed the complex technical features of the case, and wrote an opinion 37 pages in length (Moore-McCormack C. A. App. pp. 685a-722a).* The court found these salient facts:

When the "Mormackite" was built she was known to be unstable unless she carried about 600 tons of ballast to balance her war-equipment (p. 699a). After the cross-respondent purchased the vessel all of the ballast was removed but some of the war equipment which had caused the vessel to be unstable without ballast, was left on the vessel (p. 702a). Later, cabins and heavy steel plates were added to the vessel high up in her structure (p. 703a). The vessel was never thereafter tested for stability and she was probably inherently unstable (p. 697a).

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* We shall refer to cross-respondent's appendix in the Court of Appeals as "Moore-McCormack C. A. App."; to cross-petitioners' appendix in the Court of Appeals as "Claimants' C. A. App." and to cross-respondent's appendix to its petition for a writ of certiorari as "Moore-McCormack S. C. App".

Cross-respondent gave command of the vessel to Capt. McMahon just before she sailed on her south-bound voyage to Vitoria, Brazil, where the voyage which this litigation concerns commenced. The master had never before commanded or served as chief officer on a similar vessel and he had never before loaded iron ore at Vitoria (p. 708a). Cross-respondent's managing officers provided the master with a capacity plan of the "Mormackite" which showed that she was carrying 585 tons of ballast although that ballast had long since been removed (pp. 701a-702a).

Determination of the stability of a loaded vessel requires very complicated calculations which are beyond the capacity of most masters. Cross-respondent placed on the "Mormackite" a stabilogauge which is a calculating machine designed to be used in determining the ship's stability in relation to the cargo stowed. To be effective a stabilogauge must be calibrated to the lightship weight and vertical center of gravity of the ship on which it is placed (p. 704a).

Cross-respondent's managing officers, Furey, Mayo and Barrett, were ignorant of the calibration of the "Mormackite" stabilogauge and there was no evidence from anyone as to its calibration (pp. 704a, 706a, 708a). It was either calibrated to a weight and a vertical center of gravity which the vessel never had, or to her weight and center of gravity when built (pp. 710a, 721a).

The defective stabilogauge caused the vessel to be improperly stowed (p. 722a).

Although cross-respondent's assistant marine superintendent, Barrett, testified at the trial that he knew

nothing about it, he assumed that the stabilogauge on the vessel was calibrated as was another stabilogauge which he had seen on a pier—the basis for his assumption being described by the District Court as "singularly odd" (p. 706a). On that assumption he said he then made calculations and *orally* advised the master that to neutralize its incorrect calibration, he should crank into the machine a fictitious weight of cargo (p. 705a). His alleged calculations were based on what he stated at the trial were known to be the ship's lightship weight and vertical center of gravity at the time of her last voyage. However, in sworn answers to interrogatories before trial cross-respondent asserted that it was ignorant of the vessel's lightship weight and vertical center of gravity on her last voyage (Claimants' C. A. App. p. 11a).

The District Court pointed out that the "Mormackite" never had the lightship weight which Barrett assumed as that to which the stabilogauge was calibrated (p. 706a). The discussion in the opinion (pp. 705a-707a) makes it clear that the judge thought that his testimony as to his calculations and oral advice to the master, was a fabrication; and the court could not have made the decision it did if that had not been its conclusion.

The District Court denied cross-respondent's petition for limitation so far as concerns the cargo because it held that its managing officers Furey, Mayo and Barrett were in privity with furnishing the vessel with a defective stabilogauge which caused the improper stowage and the vessel's loss (p. 721a).

* * * *

Long before the trial cross-respondent's chief of operations, Captain Furey, testified by deposition that of necessity the master had to rely upon the stabilogauge furnished him to measure the ship's stability (Claimants' C. A. App. p. 14a) and that he was ignorant of both the accuracy and condition of such stabilogauge as may have been on the "Mormackite" (Moore-McCormack C. A. App. p. 704a). Long before the trial the claimants in the limitation proceedings examined on discovery a man named Kristal who was president of the company which manufactures stabilogauges. He never saw the "Mormackite" nor the stabilogauge which may have been on her but he testified that his company's records showed that a stabilogauge with a certain calibration was sold to cross-respondent in 1947 (Moore-McCormack C. A. App. p. 7a).

Kristal lives in New York City (Moore-McCormack C. A. App. p. 7a) and he was in attendance at the trial. Cross-respondent chose not to examine him as a witness and thus subject him to cross-examination. After the District Court handed down its opinion, cross-respondent's motion that Kristal's deposition be received in evidence was denied; and its motion in the Court of Appeals that Kristal's deposition be included in the record, was also denied (Opinion of Court of Appeals, Moore-McCormack S. C. App. p. 22). Nevertheless, cross-respondent boldly printed excerpts from the Kristal deposition at the very start of its Court of Appeals appendix (Moore-McCormack C. A. App. p. 7a).

In our brief on appeal we pointed out the impropriety of the inclusion in the appendix of this deposi-

tion which both District Court and a prior panel of the Court of Appeals had held was inadmissible. In reliance on these rulings we did not discuss the deposition. In its opinion the Court of Appeals accepted this deposition as part of the record and held that it established that the stabilogauge on the "Mormackite" on her last voyage in October 1954, was the one which Kristal's records showed was sent to cross-respondent seven years before, in August 1947; and that the instrument had remained in good order with the calibration appearing in Kristal's records during those seven years (Moore-McCormack S. C. App. p. 22). Neither Kristal nor anyone else testified that the instrument sent cross-respondent in 1947 was ever put on board the "Mormackite" and there is no testimony that the stabilogauge on the vessel was in such condition at the time of her last voyage that it could be used.

The District Court pointed out that cross-respondent had had ample opportunity to secure testimony as to the calibration and effectiveness of the stabilogauge on the "Mormackite" but had chosen not to go into the issue (Moore-McCormack C. A. App. pp. 704a-705a).

The Court of Appeals held that it had the right to accept new evidence on appeal. However, we submit that it had no right to adopt a deposition in violation of a United States statute, the Federal Rules of Civil Procedure (Rule 26(d)(3)), Supreme Court Adm. Rule 46, and Admiralty Rule 32 of the Southern District of New York (Appendix A). So far as we are aware, no court has heretofore held that such a deposition is binding on the parties. Furthermore,

Kristal's deposition does not establish that the stabilogauge described in his records was ever on the "Mormackite".

Under the ruling in this case an appellant may add to his appendix on appeal in the Second Circuit matter which has been excluded both by the District Court and by one panel of the Court of Appeals, in the now well justified expectation that another bench of the same court may accept this extraneous matter in violation of a statute and established Rules, base its decision on it and tell the prejudiced parties that they are foreclosed from meeting it or cross-examining the witness in the light of the evidence developed since his original examination, because they have relied on the prior decisions of both the District and Appellate Courts excluding the matter from the case.

In adopting Kristal's deposition the Court of Appeals necessarily concluded that the prior panel of the Court of Appeals and the District Court abused their discretion in refusing to receive it. We submit that there can be no abuse of discretion when the courts comply with a statute and established rules of procedure. We submit that it cannot justifiably be held that the finding of the District Court as to the stabilogauge was "clearly erroneous" when its finding was supported by the evidence before it and the conclusion of the Court of Appeals is based on an inadmissible deposition which, moreover, does not prove that a proper stabilogauge was on the vessel.

We do not mean to be disrespectful to the Court of Appeals for the Second Circuit when we suggest that the action it has taken can only be described as capricious and arbitrary.

In treating the Kristal deposition as part of the record the Court of Appeals said (Moore-McCormack S. C. App. p. 23)—

> "reserving, however, to the claimants the privilege of contradicting it. The claimants in their brief have not suggested that they wish to do this, so that we understand that we are to decide the appeal as though the deposition were a part of the record."

We did not say in our brief that we wished to meet the deposition as we relied on the rulings that it was not part of the record. In our petition for reargument we pointed out that we had never consented to the addition of this deposition to the record; that we had opposed it both in the District Court and the Court of Appeals; that we wished to cross-examine Kristal in the light of the mass of evidence developed since his examination before trial; that there was no reason for us to state that we wished to offer evidence contradicting Kristal's deposition in view of the ruling of the courts that it was inadmissible; and that we had never suggested that the Court of Appeals was free to decide this appeal on Kristal's deposition.

In its opinion denying our motion for reargument the Court of Appeals said (Moore-McCormack, S. C. App. pp. 30-31) that we had not suggested the names of other witnesses or any other testimony we could produce, nor had we stated what further cross-examination we wished to direct to Kristal, and the Court said that it would:

> "accept this clearly proven fact; and we think a return of the case for more trial now to gild

> the lily would be a useless and undesirable formality in an admiralty cause already unfortunately too long drawn out."
>
> "* * * But be that as it may, with a case which has traveled thus leisurely and with the correcting facts now fully disclosed, we think justice requires we act in knowledge of them."

Judge Learned Hand said that he would prefer to remand the case for reconsideration by the District Court as it is "an undesirable precedent to take Kristal's deposition as conclusive."

The delays in the disposition of this cause with a loss of 37 lives, are not at cross-petitioners' door but at the door of the courts themselves. A trial of the case could not be secured until some two and a half years after the vessel owner instituted its limitation proceedings with consequent stay served on all claimants. After the trial was concluded the District Judge delayed handing down his opinion for more than a year. Some months after the entry of interlocutory decree and Moore-McCormack's appeal therefrom, we moved to dismiss the appeal as appellant had done nothing to perfect the record. The Court of Appeals denied our motion; the appeal was not decided until November 30, 1959, well more than a year after the appeal was entered; and cross-petitioners' motion for reargument was not decided until four months later, on April 4, 1960. The suggestion that because of the courts' delays this case should be concluded without affording the cargo owners the right to meet an issue which the Court of Appeals has brought into the case in violation of statute and established rules, is to us a shocking doctrine.

The Court of Appeals gave no consideration to the improper capacity plan which cross-respondent's officers put on board the vessel showing that she had 585 tons of ballast which in fact did not exist; nor did that court make any reference to the District Court's statement that the evidence was persuasive that the vessel was probably inherently unstable. True this is not a definite finding that the vessel was inherently unstable but the burden of proving stability was that of the cross-respondent. Both courts below found that the vessel's instability caused her loss.

It will be noted that the Court of Appeals accepted Barrett's testimony throughout as truthful (Moore-McCormack S. C. App. p. 22), although after seeing and examining him at some length the District Court determined that he was an unreliable witness (Moore-McCormack C. A. App. pp. 705a-707a). Rule 52(a) of the Federal Rules of Civil Procedure (Appendix A) provides that an appellate court shall not set aside findings of a District Court except after giving due regard "to the opportunity of the trial court to judge of the credibility of the witnesses."

The Court of Appeals held that the practice of stowing ore as the "Mormackite" was stowed was not so uniform as to charge knowledge to cross-respondent's managing officers (Moore-McCormack S. C. App. pp. 19-20). Its vessels had made 60-70 voyages carrying ore from Brazil to the United States (Moore-McCormack C. A. App. p. 321a). Its executive officers knew that ore was stowed at Vitoria by a loading machine and that there would be no subsequent hand trimming unless they ordered it, and they were thoroughly familiar with the coning up of ore in vessels resulting

from it being chuted in without subsequent hand trimming (Moore-McCormack C. A. App. pp. 260a-261a).

Moore-McCormack's records contained stowage plans of three prior voyages of the "Mormackite" (Cls. Exs. 5, 6, 7, Claimants' C. A. App. pp. 4a-8a), which showed that ore had been coned up from lower into upper compartments as on her last voyage. Capt. Barrett, Moore-McCormack's Assistant Marine Superintendent, was familiar with the plans and he knew that Capt. McMahon had not been instructed to refrain from stowing the ore as had been the practice on prior voyages of his vessel (Moore-McCormack C. A. App. pp. 261a, 264a). Capt. Mayo, the Marine Superintendent, approved the coning up of ore as appears on the stowage plan of the "Mormackite" (Claimants' C. A. App. p. 17a).

A petitioner for limitation has the burden of proving its lack of "privity or knowledge."

Coryell vs. *Phipps*, 317 U. S. 406 at p. 409:

Not only is there absence of evidence that Moore-McCormack's managing officers were ignorant of how ore was customarily stowed at Vitoria, but, it will be noted, the evidence establishes their knowledge of the practice and that they approved it. Moreover, the Court of Appeals commented (Moore-McCormack S. C. App. p. 18) as did the District Court (Moore-McCormack C. A. App. pp. 718a-719a) that it was cross-respondent's position that it was customary for vessels to carry ore coned up as it was on the "Mormackite".

We submit that the conclusion is inevitable that cross-respondent was in privity with the stowage of

the "Mormackite" which has been found improper, inasmuch as the stowage was that which it asserts was customary and which it approved. In *Williams S. S. Co.* v. *Wilbur*, 9 F. (2) 622, the stowage found negligent had been employed on other vessels of the same ownership. The Court of Appeals for the Ninth Circuit said (at p. 623):

> "In addition to this, the appellant contends that the cargo now in question was stowed in the usual and customary manner. In the face of this testimony and this contention, it cannot be said that the owner was not responsible for the method of stowage adopted and followed, even though there is an absence of testimony tending to show that its managing officers or agents superintended the stowage of this particular cargo."

Finding that the stabilogauge on the "Mormackite" was not accurately calibrated to her lightship weight and center of gravity (Moore-McCormack S. C. App. p. 22), the Court of Appeals also found that the master was *orally informed* as to how he could neutralize its inaccurate calibration (p. 22). The District Court pointed out that to give oral information to the master on such an important matter was extraordinary indeed (Moore-McCormack C. A. App. p. 706a), and, as we have said, the District Court did not believe that he did so. That court also pointed out that there is no testimony from anyone that the chief officer was informed of the inaccuracy of the stabilogauge and how this could be neutralized; and he would normally supervise stowage of the vessel (Moore-McCormack C. A. App. p. 707a).

In *The Elkton*, 49 F. (2d) 700 (C. A. 2), it was argued that although a vessel's fitting was defective, the ship's officers knew of the defect and by proper care they could have neutralized the defect and the cargo would have sustained no damage. It was held (at p. 701):

> "When the owner accepts cargo in an unseaworthy ship, though the defect be such as may be neutralized by care, he imposes on the shipper (the cargo owner) an added risk; not merely that his servants may fail, in so far as she is sound and fit, but that they may neglect those added precautions which her condition demands."

It was then held that the negligence of which the carrier complained in that case was

> "in the management of a ship which required more care than the owner could exact at the shipper's peril."

That principle was adopted and the above language quoted by this Court in *May* v. *Hamburg (The Isis)*, 290 U. S. 333 at p. 348.

B. Fourth Question:

As the contract for the carriage of the iron ore was contained in a charter-party executed by cross-respondent's vice president (Cls. Ex. 1, Claimants' C. A. Appendix pp. 21a-22a), it clearly was a personal contract, and if the ore was lost because of breach of that personal contract, cross-respondent has no right to limitation of its liability.

Pendleton v. *Benner Line*, 246 U. S. 353 at p. 356;

Luckenbach v. *McCahan Sugar Ref. Co.*, 248 U. S. 139 at pp. 149-150;
Capitol Transp. Co. v. *Cambria St. Co.*, 249 U. S. 334 at p. 337;
Cullen Fuel Co. v. *Hedger Co.*, 290 U. S. 82 at pp. 87-88.

The Court of Appeals held that the warranty in the charter-party that the "Mormackite" would be "tight, staunch and strong and in every way fitted for the voyage" only related to the vessel's structure; and that there was no express warranty of seaworthiness as to the stowage of her cargo (Moore-McCormack S. C. App. p. 23).

We submit that the "Mormackite" was not "in every way fitted for the voyage" when her stowage was so faulty that it caused her loss in weather which the Court of Appeals described as "seasonable." This Court and other courts have held without dissent that to be seaworthy, i.e.: in condition to sail on a voyage, a vessel must be properly stowed.

The Nidarholm, 282 U. S. 681 at p. 684;
Capitol Transp. Co. v. *Cambria Steel Co.* (The *Benjamin Noble*), 244 Fed. 95 at pp. 97-98 (C. A. 6) affirmed 249 U. S. 334;
Olsen v. *U. S. Shipping Co.*, 213 Fed. 18 at p. 21 (C. A. 2);
Corsar v. *J. D. Spreckels*, 141 Fed. 260 at p. 264 (C. A. 9).

The Court of Appeals held (Moore-McCormack S. C. App. p. 23) that the charter-party warranty of fitness of the "Mormackite" only related to the southbound voyage from United States ports to

Vitoria. The charter-party (Cls. Ex. 1, Claimants' C. A. Appendix p. 21a) was executed at New York on September 3, 1954. The "Mormackite" was then at Rio de Janeiro almost at the end of her southbound voyage. Armco Steel Corp. had no cargo on the vessel on the southbound voyage and no interest in that voyage. We do not mean to be disrespectful to the Court of Appeals when we say that it is a remarkable construction of the charter-party to hold that although the voyage on which Moore-McCormack contracted in its charter-party to carry the iron ore, was from Vitoria to Baltimore, the warranty of fitness "for the voyage" related not to that voyage but to the prior southbound voyage which was then almost finished and on which Moore-McCormack had carried cargo for other merchants but not for the charterer, Armco Steel Corp.

Without relation to the express warranty of seaworthiness, there is implied in every contract for the carriage of cargo an absolute warranty that the vessel shall be seaworthy in all respects when she sails on the voyage contracted for; and that implied warranty is breached if she is improperly stowed. When the charter-party is a personal contract the vessel owner is not entitled to limitation of its liability for breach of the implied warranty.

Cullen Fuel Co. v. *Hedger*, 290 U. S. at p. 88;
Capitol Transp. Co. v. *Cambria Steel Co. (The Benjamin Noble)*, 232 Fed. 382, 244 Fed. 95, 249 U. S. 334;
Pet. of Reliance Marine Tr. etc., 206 F. (2d) 240 at p. 243 (C. A. 2);
W. R. Grace & Co. v. *Charleston etc.*, 193 F. (2d) 539 at p. 543 (C. A. 4);

Hodger Transp. Corp. v. *Gallotta*, 145 F. (2d) 870 at p. 872 (C. A. 2).

Where there is a charter-party and a bill of lading the contract of carriage is the charter-party, the bill of lading being but a receipt; and bill of lading provisions are not binding upon the parties.

The Fri, 154 Fed. 333 at pp. 336-337 (C. A. 2);
The G. R. Crowe, 294 Fed. 506 at p. 508 (C. A. 2);
Unterweser v. *Potash*, 36 F. (2d) 869 at p. 879 (C. A. 5);
The Sonia II, 151 F. (2d) 727 at p. 730 (C. A. 5);
The Nordhvalen, 6 F. (2d) 883 at p. 886 (D. of Md.).

The Court of Appeals said (Moore-McCormack S. C. App. p. 23) that Sec. 8 of the Carriage of Goods by Sea Act (46 U. S. C. sec. 1308, Appendix B) "would be ineffective unless there was a limitation of liability in the absence of privity or knowledge of the owner." The charter-party provided that any bills of lading issued should incorporate the Carriage of Goods by Sea Act but there is no provision that the charter-party is controlled by that Act.

We submit that the decision of the Court of Appeals that cross-respondent is entitled to limitation of its liability for loss of the iron ore is in conflict with the decisions of this Court and of the various Courts of Appeal cited above.

Conclusion

We submit that a writ of certiorari should be issued because: the action of the Court of Appeals in adopting the Kristal deposition was capricious and arbitrary; the finding of the District Court that cross-respondent's managing officers were in privity with the cause of the vessel's loss was not "clearly erroneous" but the only finding justified by the evidence before the court; that the ruling of the Court of Appeals that cross-respondent is entitled to limit its liability for the loss of the cargo is in conflict with the decisions of this Court and those of other circuits.

Dated: New York, N. Y.
April 29, 1960.

Respectfully submitted,

HENRY N. LONGLEY,
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Counsel for Cross-Petitioners.

APPENDIX A

Supreme Court Admiralty Rules

"Rule 46. *Evidence—how taken.* In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties."

Former Sec. 641 of 28 U. S. C., Included in Present 28 U. S. C. Chapter 117 at Page 578. (This Section Still Applies in Admiralty; *Mercado* v. *The United States*, 184 F. (2d) 24 F. (2d) at p. 27 [C. A. 2]).

"But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause."

Federal Rules of Civil Procedure

(28 U. S. C. Rule 26 (d)):

"*Use of Depositions.* At the trial * * * any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions: * * *

"(3) The deposition of a witness * * * may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, * * *; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

(Rule 52 (a)):

"*Effect.* In all actions tried upon the facts without a jury * * * the court shall find the facts specially * * *. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

ADMIRALTY RULES OF THE SOUTHERN DISTRICT OF NEW YORK

"Rule 32. The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except that their use shall be limited as follows:

"*Use of Depositions.* At the trial or upon the

hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is bound on a voyage to sea, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the depositions; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment."

APPENDIX B

Carriage of Goods by Sea Act

(Title 46 U. S. C. Sec. 1303):

"(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

* * * * *

"(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

(Section 1308):

"The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels."

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FILED
MAY 11 1960
JAMES R. BROWNING, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 904

In the Matter

—of—

The Petition of MOORE-McCORMACK LINES, INC., as owner of the S.S. MORMACKITE, for exoneration from or Limitation of Liability.

ARMCO STEEL CORPORATION and WESSEL DUVAL & CO., INC.,

Cross-Petitioners,

MOORE-McCORMACK LINES, INC.,

Cross-Respondent.

CROSS-RESPONDENT'S BRIEF

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MOORE-McCORMACK LINES, INC.,

Cross-Respondent.

CROSS-RESPONDENT'S BRIEF

Cross-respondent prays that this petition be considered with its own petition for a writ of certiorari in No. 871, inasmuch as the two petitions are made in the same proceeding and involve the same decisions.

As to Questions 1, 2 and 3

The Court of Appeals reversed, and allowed Moore-McCormack to limit liability as to cargo claims, because it found that the District Court was plainly wrong in deciding that the vessel's stabilogauge was wrongly calibrated.

The District Court found that the stabilogauge was procured for the vessel in 1945 and was calibrated to her structure as then existing. There was *no evidence whatsoever* to support this finding and we are amazed at Armco's unjustifiable assertion (petition, p. 11) that the Court's "finding was supported by the evidence before it." This is not so.

A little of the pre-trial history of this proceeding is necessary to a full understanding. At pre-trial the Court held that claimants had the burden of proof on issues of liability (12a-13a). Moore-McCormack urged the Court on several occasions to require claimants to disclose what grounds of liability they asserted. The Court refused (8a-9a). When the case was called for trial we told the Court that we were not prepared to go to trial because we did not know on what grounds claimants predicated liability, but the Court nevertheless directed us to proceed (14a-16a, 19a-21a).

If, as Armco suggests in Question 2, there is anything in this case which calls for an exercise of this Court's power of supervision, it is the District Court's requiring Moore-McCormack to go to trial without a disclosure of the bases of the claims of liability. To add insult to injury the Judge required Moore-McCormack to go first with its proofs although it occupied the position of a defendant and claimants had the burden of proof, and then based his decision on findings as to the stabilogauge, without evidence and as to which there was no issue. In these days of enlightened pre-trial procedures, we consider this shocking and unjust.

Moore-McCormack offered no evidence as to the calibration of the stabilogauge because the burden of proof of unseaworthiness was on claimants and, since they put in no evidence on the point, and did not assert that the stabilogauge was wrongly calibrated, there was no occasion

to do so. This was particularly true because Armco was in possession of positive evidence as to exactly how the stabilogauge was calibrated, and when it was made. The claimants as a group, including Armco, *before trial*, took the deposition of Robert M. Kristal, president of the company that made the instrument. He testified that it was "purchased for the MORMACKITE" and shipped on August 8, 1947. This was two years after the District Court found that it was bought. He also testified to exactly what vessel characteristics it was calibrated (7a).

Because of the District Court's egregious error as to the stabilogauge, we moved immediately following the filing of its opinion for a reconsideration and proffered the Kristal deposition. McGohey, *J.*, denied the motion without opinion. We promptly moved in the Court of Appeals for leave either to take Kristal's testimony or to have the Court consider his deposition previously taken. While the Court of Appeals in form "denied" our motion, it said:

> "Appellant may of course argue as to the claimed effect of the excluded evidence in presenting its appeal" (App. B., 22-3).

This was full permission to Moore-McCormack to bring the deposition to the attention of the Court on argument and fully justifies its inclusion in the printed record. Armco's assertions (*e.g.*, petition, p. 12) that it had been ruled that the deposition was not a part of the record, flatly misrepresent the situation.

It is patent, therefore, that the District Court was completely wrong in finding that the stabilogauge was calibrated to the vessel's characteristics in 1945, and that the Court of Appeals had no alternative but to find that the District Court was plainly wrong.

Although it has had full opportunity to do so, Armco has not had the temerity to assert that it has or can get any evidence to show that the District Court's finding as to how the 'gauge was calibrated was right.

Moreover, the gravity of the District Court's error in basing its decision on the stabilogauge although the parties were not in dispute over its adequacy during trial is demonstrated by the fact that, if it had been calibrated as the District Court found, the error it would have contained, in terms of "G M" (the conventional yardstick of stability) would have been only 1/10 of a foot. We demonstrated to the Court of Appeals that we can prove this by the testimony of the scientist who invented the stabilogauge. Armco's expert testified that a GM of from 1.0 to 3.25 feet and beyond would be proper (535-6a). Obviously a variation of 1/10 foot is wholly unimportant.

Present expressions of interest in "administration of justice" sound strange, indeed, coming from cross-petitioners who sat back below knowing that the District Court had made a glaring error of fact, but hoping to hold the decision in their favor on appeal by inducing the Court of Appeals to shut its eyes to the truth, as developed in a deposition taken by cross-petitioners themselves. Fortunately, appellate judges are not ostriches and none of the rules referred to by cross-petitioner even purports to make them so.

In fact, cross-petitioners evade even mentioning the one and only rule applicable, namely, Supreme Court Admiralty Rule 45. This evasion cannot be excused as inadvertent, since the Court of Appeals itself based its decision expressly and squarely on "Admiralty Rule 45" (Petitioner's Appendix B, p. 31).

Nor do the cross-petitioners attempt to explain how the Court of Appeals' acceptance of the Kristal deposition

could conceivably "lead to disruption of the administration of justice" in other Courts of Appeals, the majority of which have expressly provided in their own rules for admission of depositions on appeal. For example, see Rule 14 of the First Circuit and Rule 23 of the Third Circuit. See also Rule 32 of the Ninth Circuit, Rule 12 of the Fifth Circuit and Rule 10 of the Sixth Circuit. *The Silverpalm*, 9 Cir., 79 F. 2d 598; *Isthmian S.S. Co.* v. *Martin*, 4 Cir., 170 F. 2d 25.

If "administration of justice" is the goal, as claimed by cross-petitioners, the one way *not* to achieve it is to preclude the Court of Appeals from correcting a glaring mistake of fact made below, and no matter how they may disguise it, this is what cross-petitioners ask this Court to do here.

Armco raises three other questions, all of fact, in hopeful support of its Questions 1-3:

Armco asserts that the District Court found that Barrett was an unreliable witness (p. 14). This is a misrepresentation. In fact the District Court accepted Barrett's testimony. In inviting Moore-McCormack to reply to Armco's petition for rehearing, the Court of Appeals put two questions to us, the first of which was—

> "(1) Whether the cause should be remanded to Judge McGohey to make a finding that Barrett warned the master of the amount to be 'cranked' into the stabilogauge; * * *"

Doubtless this question was put because Armco had argued to the Court of Appeals, as it now does to this Court, its own conception of the District Judge's views on Barrett's credibility. Our answer to this question obviously satisfied the Court of Appeals—so much so that it found no need

to mention the matter in its opinion of April 4, 1960 denying Armco's petition for rehearing.

Armco asserts that the prior practice of stowing ore has a bearing on the issues (petition, pp. 14-15). This is, at most, another question of fact and, singularly inappropriate in this Court inasmuch as the District Court made no finding on the point and the Court of Appeals said the evidence would not have justified a finding in Armco's favor (App. B, p. 19). However, in this connection, Armco is guilty of another flagrantly misleading assertion (petition, p. 15), viz., that it was Moore-McCormack's "position that it was customary for vessels to carry ore coned up as it was on the MORMACKITE." This statement is quite unjustifiable. That was never Moore-McCormack's position and Armco's proctors know it well. Moore-McCormack's position has been, throughout, that the ore on the MORMACKITE *was not coned up at all.*

The extent to which Armco resorts to fact issues to support its petition appears from another unjustifiably wrong assertion. Armco says the District Court found that the vessel "was probably inherently unstable" (petition, p. 6). This is said in a context which can only have been intended to suggest that the vessel was *structurally* unstable. However, the District Court's finding related to her stability as loaded for the final voyage, i.e., stability as affected by the manner in which the ore had been stowed (697a). Armco's own expert admitted that C2-S-B1's are inherently stable (477-8a). He did not challenge the stability figures of Moore-McCormack's expert, Wilson, and the Court accepted these (330-5a, 702-3a, 705a, 706a).

As to Question 4

Armco's Fourth Question would have this Court review the singularly narrow issue of the proper construction of the charter party contract between Moore-McCormack and Armco—a matter of no interest to anyone else, not even the other cross-petitioner, Wessel-Duval, whose cargo of cocoa beans was carried under a bill of lading.

Nor does the Court of Appeals' construction of the Armco charter conflict with, or even vary from, decisions of other Courts interpreting different contracts made on different terms.

Reference here to cases involving the implied warranty of seaworthiness are wholly beside the point for the simple reason that there is none where, as here, the carrier's obligation is expressed. Similarly, as to the so-called "express warranty" in Clause 2 of the charter which, as both Courts below held, did not purport to state Moore-McCormack's carrier obligations in respect to stowage and seaworthiness, the same being defined by incorporation of COGSA in the charter. Needless to add, the *main* thrust of COGSA is to cut down the carrier's obligation to exercise due diligence. Title 46 U. S. C. §1303.

Nor is there anything "remarkable" (cross-petition, p. 19) about the Court's applying the Clause 2 warranty to the ship before she loaded at Vitoria and we venture to say that Armco would not be so ready to disclaim "interest" in her then, in a breach of contract case arising from the ship's failure to "proceed" to Vitoria.

Equally beside the point are cross-petitioner's references to decisions that the charter party is the contract of carriage, between shipowner and charterer, with the bill of lading serving only as a receipt. Neither the District Court

nor the Court of Appeals found COGSA applicable because of its incorporation in any bill of lading but because the Act was incorporated in the charter party itself, the contract of carriage (722a), citing *U. S.* v. *Wessel Duval & Co.*, S. D. N. Y., 115 F. Supp. 678. The English rule is the same. *Anglo-Saxon Petroleum Co.* v. *Adamastos*, H. L. [1959] A. C. 133. Furthermore, the personal contracts doctrine never extends "to promises to do acts necessarily performed through the intervention of others." *The No. 34*, 2 Cir., 25 F. 2d 602, 607; *The Eastland*, 7 Cir., 78 F. 2d 984, 986, cert. den. 297 U. S. 703; *The Ice King*, 2 Cir., 261 Fed. 897; *The Soerstad*, S. D. N. Y., 257 Fed. 130. And here the charter made it expressly clear that loading was to be done by stevedores appointed by "*Charterers*," i.e., Armco (Cl. Ex. 1, Clause 37).

Finally, as the Court of Appeals correctly noted, the incorporation of COGSA would be wholly ineffective unless there was limitation of liability in the absence of privity or knowledge of the shipowner. Title 46 U. S. C. §1308. *Cf. The Galileo*, 2 Cir., 54 F. 2d 913, 916, aff'd 287 U. S. 420; *The Yungay*, S. D. N. Y., 58 F. 2d 352, 357.

Armco has no higher status than Wessel-Duval (or for that matter, any other shipper) whose rights are also controlled by COGSA and cross-petitioners concede, as they have to, that Wessel-Duval cannot evade limitation by relying upon any personal contract theory.

If This Petition Is Granted, Moore-McCormack's Petition in No. 871 Should Be Granted

Armco's petition (No. 904) is based fundamentally upon an alleged error of the Court of Appeals in finding that the stabilogauge was properly calibrated and holding that the District Court was plainly wrong in holding that it was not properly calibrated. The District Court's error underlies the finding of both Courts on which liability was pitched, namely that the ore was badly stowed. Armco itself concedes (cross-petition, p. 7) that one of the "salient facts" found by the District Court was that "the defective stabilogauge caused the vessel to be improperly stowed."

Since the foundation stone of the District Court's finding of liability was a miscalibrated stabilogauge, who can say what his finding would have been as to the propriety of the stowage if he had not felt that the officers were misled by the stabilogauge? True, in his opinion he put some weight on the testimony of the survivors as to how the ore was stowed and some weight on the fact that the ore shifted. It is impossible, however, to say what weight he would have given to these hotly disputed issues if he had known that the officers were not misled by the stabilogauge.

If this Court should decide that the Court of Appeals was wrong in correcting, without remand, the District Court's error concerning the stabilogauge, the entire cause should be remanded to the District Court for retrial of all the issues, including whether the stowage was proper and what caused the loss. Clearing up the District Judge's erroneous conception should persuade him that the stowage was in fact proper and that the true cause of the vessel's capsize was the negligent increase of speed in the storm. Liability to personal injury and death claimants will then

remain, but limited to the amount fixed by the Act, Title 46, U. S. Code, Sec. 183b, about $600,000.

Moreover, it seems that the District Court could not have exonerated the chief mate for bad stowage if it had known that he was not misled by the stabilogauge. We do not understand how the Court of Appeals can justify granting recovery to the chief mate's estate, or at least full recovery, in the light of its finding that he was not misled by the stabilogauge.

The foregoing considerations demonstrate, we submit, that the stabilogauge issue so underlies and permeates the entire case that if Armco's petition is granted, Moore-McCormack's petition should likewise be granted.

Dated New York, N. Y.
May 10, 1960

Respectfully submitted,

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